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# New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation

Ruby L. Lee\*

## I. INTRODUCTION

The first test tube baby was born on July 25, 1978, in Britain.<sup>1</sup> Since then, assisted reproductive technologies have expanded beyond artificial insemination to various forms of in vitro fertilization ("IVF").<sup>2</sup> Celebrities such as Deidre Hall<sup>3</sup> and Joan Lunden<sup>4</sup> have made famous the use of surrogates to carry their babies to full term. In the past, women volunteered to be traditional surrogates, agreeing to donate their own eggs and to carry the babies through pregnancy on behalf of the commissioning parents.<sup>5</sup> Today, the practice of traditional surrogacy is replaced by gestational surrogates (also known as "gestational carriers").<sup>6</sup> This trend grew out of the need for commissioning parents to avoid legal controversies such as those found in cases like *In re Baby M*, in which the court upheld the traditional surrogate's right to exercise her custodial rights over the commissioned child

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1. *World's First Test-Tube Baby Is Pregnant*, DAILY MAIL, July 10, 2006, [http://www.dailymail.co.uk/pages/live/articles/news/news.html?in\\_article\\_id=394894&in\\_page\\_id=1770](http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=394894&in_page_id=1770) (last visited Mar. 31, 2009).

2. Polly Morrice, *Children on Demand*, N.Y. TIMES, Apr. 22, 2007, at 7-16, available at <http://www.nytimes.com/2007/04/22/books/review/Morrice.t.html>.

3. DeidreHall.com, Online Chat, Dec. 10, 1995, [http://www.deidrehall.com/chats/oprah\\_chat.cfm](http://www.deidrehall.com/chats/oprah_chat.cfm) (last visited Jan. 23, 2009).

4. Interview by Deborah Norville with Joan Lunden, *Deborah Norville Tonight* (MSNBC television broadcast May 14, 2004), available at <http://www.msnbc.msn.com/id/5014340>.

5. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

6. Reproductive Medicine Associates of New Jersey, *Treating Infertility: Gestational Surrogate*, [http://www.rmanj.com/gestational\\_carrier.html](http://www.rmanj.com/gestational_carrier.html) (last visited Jan. 23, 2009).

based on the indisputable fact that she was the biological mother — both egg donor and carrier of the baby.<sup>7</sup> Unlike traditional surrogates, gestational surrogates retain no genetic ties to the babies they carry.<sup>8</sup> Instead the blastocysts used to impregnate gestational surrogates are created using ova from either the commissioning mothers or egg donors.<sup>9</sup> Gestational surrogacy has generated the commercial surrogacy industry, which has filtered into mainstream culture and created stereotypes about the women who act as surrogates. For example, the 2008 film *Baby Mama* depicts an infertile career woman, portrayed by actress Tina Fey, who hires a working-class woman to be a gestational surrogate for her baby.<sup>10</sup> The prevailing stereotype of American women who opt to become gestational surrogates is that they are motivated primarily by financial considerations, which is not true.

The primary focus of this Note is to address the legal, political, and ethical issues surrounding commercial surrogacy in its current state, both internationally and domestically. First, this Note will address the outsourcing of commercial surrogacy to India as a case study to understand how transnational commercial surrogacy arrangements are formed, to identify the source of the demand for surrogacy in India, and to understand why we need to create a regulatory structure for commercial surrogacy. This Note highlights how India, as a state, is ill-equipped to enact appropriate legislation to regulate the harmful social side effects of rapid change in advanced reproductive technologies. As its government is unable to ensure public safety for its citizens who choose to become gestational surrogates, as its government does not enforce any particular ethical standards in dealing with the complexities in the evolving medical field of infertility.

Second, to illustrate that this problem is not unique to India, this Note will provide a comparative legal and regulatory inquiry into the shortfalls of existing surrogacy laws in some of the European Union ("E.U.") states and the United States. Current trends reveal that the prohibitive laws in some E.U. states encourage Europeans citizens in search of more favorable surrogacy laws to hire American women as gestational surrogates.<sup>11</sup> In fact, many couples from all over the world, including places like Australia, Canada, France, Germany, Iceland, Japan, Saudi Arabia, Spain, and Dubai, rely on American women for gestational surrogates.<sup>12</sup> American couples themselves are no exception and are also increasingly looking towards India in search of women willing to act as gestational surrogates at more af

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7. *In re Baby M*, *supra* note 5, at 1234.

8. Reproductive Medicine Associates of New Jersey, *supra* note 6.

9. *Id.*

10. Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 47, available at <http://www.newsweek.com/id/129594>.

11. *Id.* at 49.

12. *Id.*

fordable prices.<sup>13</sup> Disparate laws for dealing with surrogacy between states will likely encourage this trend to continue.

Finally, this Note will contrast the lack of regulation in India, some of the E.U. states, and the U.S. with Israel's proactive approach to regulating commercial surrogacy. Israel's comprehensive approach to regulation of commercial surrogacy creates uniform industry standards, medical standards, and a legal structure to prevent exploitation of surrogates, commissioning parents, and children.

Overall, this Note is both a comparative inquiry into international surrogacy laws — or the lack thereof — and a call for enactment and implementation of regulatory policies to guard against the potential exploitation of women's biological reproductive bodies as cheap labor and resources on behalf of wealthier citizens worldwide. This Note will explore issues surrounding transnational surrogacy contracts, including the bargaining power of disadvantaged Indian women in negotiating surrogacy contracts, the source of the high demand of outsourced commercial surrogacy (also known as fertility tourism), and the reasons why the law has not kept pace with advances in science and reproductive technologies.

## II. INDIA: A CASE STUDY IN OUTSOURCING COMMERCIAL SURROGACY

### A. THE BENEFITS OF COMMERCIAL SURROGACY

Currently, infertile American couples are going to India to hire gestational surrogates at a fraction of the cost of their American equivalents.<sup>14</sup> Commercial surrogacy involves monetary compensation paid to a woman who performs her contracted service as a gestational surrogate.<sup>15</sup> A commercial surrogacy arrangement involves two parties — the commissioning parents and the gestational surrogate — who execute a "preconception agreement" defining their mutual obligations and considerations.<sup>16</sup> In such an arrangement, a gestational surrogate agrees to carry her pregnancy to term and to provide the commissioning parents with the child or children to whom she gives birth.<sup>17</sup> The blastocysts implanted in the uterus of the gestational surrogate may be genetically related to one or both of the commissioning parents.<sup>18</sup> Alternatively, the blastocysts may be generated through the use of donated eggs and/or semen.<sup>19</sup> Gestational surrogates are guaran-

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13. Ali & Kelley, *supra* note 10, at 49.

14. Henry Chu, *Wombs for Rent, Cheap*, L.A. TIMES, Apr. 19, 2006, at A1.

15. Katherine Drabiak et. al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 301 (2007).

16. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 430, 435-36 (2004).

17. *Id.*

18. *Id.* at 436.

19. *Id.*

teed their negotiated fees apart from any additional costs associated with the agreement, such as medical care.<sup>20</sup>

On average, an Indian gestational surrogate receives between \$2,800 and \$5,600 for her services.<sup>21</sup> For perspective, these amounts are equivalent to ten years' salary for rural Indian women.<sup>22</sup> The total cost of gestational surrogacy in India is approximately \$12,000.<sup>23</sup> In contrast, the total cost of gestational surrogacy in the U.S. is between \$70,000 and \$150,000.<sup>24</sup> Looking at the drastic difference in cost, it is easy to understand why American couples increasingly seek out Indian women as gestational surrogates. However, this practice raises ethical concerns, indicating that U.S. outsourcing is no longer limited to manufacturing and service jobs, but has expanded to include women's biological and reproductive bodily functions.<sup>25</sup>

To understand this trend in India, one must recognize that the temptation to outsource is too great for middle-class couples facing infertility to deny. For example, Thomas and Karen Kim initially decided to hire a gestational surrogate through a private U.S. agency until they discovered the well-known gynecologist, Nayna Patel, from Anand, a small town in Gujarat, India.<sup>26</sup> Dr. Patel, an IVF expert, founded the Akanksha Infertility and IVF Clinic in 1999.<sup>27</sup> In 2003, Dr. Patel delivered her first baby from a gestational surrogate.<sup>28</sup> Dr. Patel developed a reputation for having a high success rate of gestational surrogate deliveries in her clinic, leading to an interview on ABC's *Good Morning America*.<sup>29</sup> Subsequently, the Akanksha Clinic received a great deal of publicity as a center for surrogacy on *The Oprah Winfrey Show*.<sup>30</sup>

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20. Drabiak et al., *supra* note 15, at 301.

21. Chu, *supra* note 14, at A21.

22. Oprah.com, Wombs for Rent: Journey to Parenthood, [http://www.oprah.com/slideshow/world/globalissues/slideshow1sshealth1009\\_284/5](http://www.oprah.com/slideshow/world/globalissues/slideshow1sshealth1009_284/5).

23. Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, Aug. 22, 2007, at 126, available at <http://www.marieclaire.com/world/articles/womb-rent-india-7>. See also Uday Mahurkar, *Donating a Womb*, INDIA TODAY, Sept. 13, 2007, at 56, available at [http://indiatoday.digitaltoday.in/index.php?option=com\\_content&Itemid=1&task=view&id=1174&sectionid=25&issueid=12&page=archive](http://indiatoday.digitaltoday.in/index.php?option=com_content&Itemid=1&task=view&id=1174&sectionid=25&issueid=12&page=archive) (last updated June 4, 2008).

24. Mahurkar, *supra* note 23.

25. This is not the type of outsourcing Thomas L. Friedman advocates in his book, *The World Is Flat*. Friedman argues outsourcing low-skilled jobs to India would benefit the U.S. labor market by raising domestic labor standards to compete primarily in the highly skilled and complex management positions that new advanced technologies would continue to generate. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 3, 24-29 (Picador 2007) (2005).

26. Mahurkar, *supra* note 23.

27. *Id.*

28. *Id.*

29. *Id.*

30. Oprah.com, *supra* note 22.

Dr. Patel dismisses the criticism that her surrogacy services are equivalent to renting a womb.<sup>31</sup> Instead, she considers it an equivalent to donating a womb.<sup>32</sup> Dr. Patel does not charge any agency fees for matching up infertile couples with gestational surrogate candidates.<sup>33</sup> Rather, her clinic only charges for the IVF and hospital fees.<sup>34</sup> Dr. Patel acknowledges that on many occasions, the gestational surrogates do get attached to the babies they carry, forgetting that they share no genetic ties.<sup>35</sup> Dr. Patel and her husband, Hitesh, an orthopedic surgeon, counsel the surrogates on the psychological challenges they face to ensure that the surrogate candidates can adequately deal with the psychological aspects of gestational surrogacy.<sup>36</sup> In addition, the Patels ensure the money these women receive is not exploited by their husbands by transferring the funds directly under the gestational surrogates' children's names.<sup>37</sup>

As televised on *The Oprah Winfrey Show*, correspondent Lisa Ling traveled to the Akanksha Infertility and IVF Clinic in Anand, India to follow an American couple, Jennifer and Kendall, as they began the surrogacy process and interviewed potential gestational surrogates.<sup>38</sup> At that time, 250 to 300 infertile couples were reported to be on a waiting list to participate in the program.<sup>39</sup> The clinic requires surrogate candidates to be in good health, between the ages of eighteen and forty-five, and to have previously borne children of their own — for psychological and physical reasons.<sup>40</sup>

Over the course of her investigation, Ling discovered that the Indian women participating as gestational surrogates used the money they earned to purchase nice family homes and to provide their children with a good education.<sup>41</sup> Ling also acknowledged the cultural drawbacks and stigmas associated with becoming a surrogate and expressed concern for potential exploitation of these women.<sup>42</sup> Ultimately, Ling rejected the argument that the women were being exploited.<sup>43</sup> She commented, "So many people from Europe and other countries come to the United States, but it's so expensive. No one says that American women are being exploited when they become surrogates."<sup>44</sup> Instead, Ling argued, "Now this baby and this cou-

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31. Mahurkar, *supra* note 23.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Oprah.com, *supra* note 22.

39. *Id.*

40. Chu, *supra* note 14, at A21.

41. Oprah.com, *supra* note 22.

42. *Id.*

43. *Id.*

44. *Id.*

ple will have this bond with this country. And in a way, become these sort of ambassadors, these cultural ambassadors. It is confirmation of how close our countries can really be."<sup>45</sup>

There is a point to be made regarding the financial freedom these Indian women are able to bring to themselves and their families through gestational surrogacy. Ling may be reflecting changes in social stigma regarding gestational surrogates in India today. Even so, Indian women who fear social boycott try to keep their surrogacy a secret by living at Dr. Patel's clinic for the duration of the pregnancy.<sup>46</sup>

However, some women are beginning to be open about their roles as gestational surrogates, even participating in a second surrogacy arrangement in some cases.<sup>47</sup> For example, Pushpa Pandya, a twenty-seven-year-old gestational surrogate, used the money to build a house with her husband, a delivery man for a courier company.<sup>48</sup> Pandya is planning to be a surrogate again to pay for her daughter's medical school education to become a doctor.<sup>49</sup> She acknowledged that she was initially treated as an outcast among her family and friends, but once they saw her financial status rise, her involvement in surrogacy became acceptable.<sup>50</sup> There is no question that Indian women can benefit financially from participating as gestational surrogates. However, one must look beyond the individual cases to the practice of commercial surrogacy as a whole to truly understand the long-term implications of the growing fertility tourism market in the context of global trade between advanced and developing countries.

On the surface, it appears that commercial surrogacy arrangements in India are a win-win situation for all parties involved. Dr. Patel is a unique example of someone who is governed by her own ethical principles while facilitating surrogacy arrangements. She has an interest in serving the public good by assisting infertile couples in obtaining children of their own while assisting poor Indian women with the opportunity for economic advancement.<sup>51</sup> Dr. Patel may be a pioneer in outsourcing gestational surrogacy arrangements in India, but it is important to acknowledge that she is an exceptional individual. She seems to care that her surrogacy practice maintains ethical standards by treating her clients fairly. She ensures that the surrogate candidates are properly screened and that sufficient protective measures are enacted when they are admitted to her practice as gestational surrogates.

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45. Oprah.com, *supra* note 22.

46. Mahurkar, *supra* note 23.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

Unfortunately, Dr. Patel's example will not prevent other surrogacy agencies and medical practitioners from employing unethical practices solely to generate profit. Without the government of India implementing policies to protect the public welfare of its citizens, it will be left to private individuals like Dr. Patel to voluntarily protect gestational surrogates, children, and families from being exploited. When most surrogacy agencies are focused solely on the economic gain, the significant social, political, and ethical considerations surrounding commercial surrogacy become more urgent. Furthermore, the potential for exploiting poor women's reproductive functions as a form of cheap labor for economic profit is greatly heightened. Thus, looking beyond success stories, it is important to recognize that this unregulated industry may be a serious concern legally, socially, and ethically.

#### B. INDIA'S INADEQUATE LAWS TO REGULATE COMMERCIAL SURROGACY

In 2006, the Indian Council of Medical Research projected that the commercial surrogacy industry in India would generate \$6 billion per annum.<sup>52</sup> This appears to be an exaggerated figure, given that the actual industry figure for 2007 was \$4.5 million,<sup>53</sup> although there is little doubt that this industry is growing.

The closest India came to regulating commercial surrogacy was in 2005.<sup>54</sup> At that time, the Indian Council of Medical Research issued a guideline requiring "the surrogate mother . . . to sign a contract with the childless couple."<sup>55</sup> Similar policing by medical communities is also practiced in the U.S., where both the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology enforce ethical standards by "refus[ing] to endorse fertility clinics not adhering to widely accepted practice guidelines."<sup>56</sup> Since neither India nor the United States has national regulatory agencies to enforce surrogacy laws, the private industry is left to regulate itself. It is apparent that self-regulation is not the answer.

Since the phenomenon of transnational commercial surrogacy contracts is new, it is not surprising that India lacks any legal precedent in this area. It remains unclear how the Indian or the U.S. courts would adjudicate dis-

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52. Chu, *supra* note 14, at A21.

53. *Court Refuses to Intervene for Law on Surrogate Motherhood*, INDIA ENEWS.COM, Apr. 5, 2007, <http://www.indiaenews.com/india/20070405/45932.htm> (last visited Jan. 23, 2009); see also *Court Refuses to Intervene for Law on Surrogate Motherhood*, MEDINDIA.COM, Apr. 11, 2007, [http://www.medindia.com/news/view\\_news\\_main.asp?x=19912](http://www.medindia.com/news/view_news_main.asp?x=19912) (last visited Jan. 14, 2009).

54. Mahendra Kumar Singh, *New Laws to Rein in "Womb Business,"* THE TIMES OF INDIA, Oct. 31, 2007, <http://timesofindia.indiatimes.com/articleshow/2503791.cms> (last visited Jan. 14, 2009).

55. *Id.*

56. Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 304 (2005).



putes arising from transnational surrogacy agreements.<sup>57</sup> To date, the Delhi High Court has refused to intervene. In April 2007, Namita Roy petitioned the Delhi High Court, arguing that "[t]he social issue involved here is that surrogacy in the absence of laws or regulation has become a free playing field for unscrupulous intermediaries who lure and push uneducated and poor women into the surrogate motherhood."<sup>58</sup> The Delhi High Court refused to intervene to enact any law on the issue of surrogacy.<sup>59</sup> Instead, Chief Justice M. K. Sarma and Justice Sanjiv Khanna directed Roy to raise the issue directly with branches of the Indian government rather than the Court.<sup>60</sup> The Court indicated that the Ministries of Social Welfare and Health would be the appropriate agencies for Roy to address the need for regulation of the business of hiring surrogates.<sup>61</sup> The Court held that surrogacy is "a personal issue and the court cannot interfere."<sup>62</sup>

It is unclear when this issue will become a more pressing matter for both the Courts and the government of India to take more seriously. Roy's petition addressed possible abuses that could arise from transnational commercial surrogacy arrangements, warning "that there was every possibility of misuse of the children born out of surrogacy for terrorism, prostitution or unethical genetic engineering research as the foreigners who pay for the child would not have any emotional bonding with the kid."<sup>63</sup> This list does not even include other important ethical concerns, such as the trend of fertile, married, career women opting out of bearing their own children in favor of convenience. In the April 6, 2007 issue of *The Hindu Business Line*, Gagandeep Kaur addressed concern over "increasing number[s] of healthy, married working women [who] are now making inquiries about surrogate motherhood. Keen to be mothers and yet not willing to put their careers on hold, these career-driven women have given a new twist to the concept of outsourcing."<sup>64</sup>

An IVF consultant and endoscopist, Dr. Sunita Tandulwadkar confirmed that increasing interest in using surrogates has come from career women who do not want to take a break from their careers.<sup>65</sup> Examples of this phenomenon include an Indian IT professional and a Singaporean professional.<sup>66</sup> In the case of the Singaporean woman, she had the Indian ges-

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57. Singh, *supra* note 55 ("In the absence of any clear laws on the issue, foreigners are unable to get legal assistance when it comes to taking their child back to their home country.").

58. *Court Refuses to Intervene for Law on Surrogate Motherhood*, *supra* note 54.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Gagandeep Kaur, *Outsourcing a Womb*, THE HINDU BUSINESS LINE, Apr. 6, 2007, at Life-4, available at <http://www.blonnet.com/life/2007/04/06/stories/2007040600190400.htm> (last visited Mar. 31, 2009).

65. *Id.*

66. *Id.*

tational surrogate flown to Singapore so the Singaporean woman could have her baby delivered where she resided.<sup>67</sup> Dr. Patel countered this trend by responding, "We never entertain surrogacy for such causes and only medically-indicated genuine cases are taken up for surrogacy."<sup>68</sup> Dr. Tandulwadkar also rejects medically unnecessary surrogacy arrangements, stating, "We advise these women not to go in for surrogacy since medically they can conceive and deliver babies. We also tell them that a bond is formed between mother and child during pregnancy."<sup>69</sup> Although these doctors may disapprove of providing surrogates to women capable of having their own children, there are no legal barriers that prevent these types of arrangements from forming. This lack of regulation is particularly troubling given that the inducement to act as a gestational surrogate involves substantial economic gain that can effectively help these women leave poverty.

Perhaps the Indian courts refuse to hear these cases because they are ill-equipped to address such social and ethical issues in the absence of a clear policy position articulated by the Indian government. The urgency now rests with the Indian government to address new issues surrounding commercial surrogacy. The Indian government must enact laws to provide the courts with legal standards to apply when addressing developing issues in family and reproductive laws arising from advancement in assisted reproductive technologies. The Indian Ministry of Women and Child Development is starting to recognize the potential risk for exploitation of poor Indian women.<sup>70</sup> In October 2007, Minister Rehuka Chaudhary announced that the Ministry of Women and Child Development would be "considering a law to regulate the business of surrogate motherhood and sperm banks on the lines of similar laws in other countries."<sup>71</sup> This would be a good first step toward protecting the interests of both gestational surrogates and commissioning parents, including Americans. The urgency to deal with potential incidents of abuse and surrogacy disputes requires more than just an evaluation of social policies. While the need for regulation is notable, the urgency for these laws has been met with slow, bureaucratic acknowledgements, and without passage of any legislation on the matter. Until such laws are enacted, the potential for abuse, exploitation, and harm to gestational surrogates, commissioning parents, and most importantly, the children, remains a real threat.

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67. Kaur, *supra* note 65.

68. *Id.*

69. *Id.*

70. Singh, *supra* note 55.

71. *Id.*

### III. A COMPARATIVE LOOK AT SURROGACY LAWS: FINDING GLOBAL CONFLICTS

#### A. EUROPE'S SOLUTION TO REGULATING SURROGACY: FERTILITY TOURISM

As mentioned in the Introduction, the increasingly popular trend in outsourcing commercial surrogacy has found new markets in both the U.S. and India.<sup>72</sup> The demand for this new market is driven by infertile couples who go abroad to hire gestational surrogates because of personal financial constraints or domestic laws that are either restrictive or that ban surrogacy altogether.<sup>73</sup> The obstacles European couples face in seeking gestational surrogates highlight how cultural norms surrounding surrogacy are reflected in the government's inability to comprehensively regulate the practice through either inaction or limiting access to commercial surrogacy within its own borders. Such a strategy may have been effective fifty years ago, but that is no longer true today. In an increasingly integrated global market, citizens seem to circumvent prohibitive domestic laws around hiring gestational surrogates simply by engaging in fertility tourism.

Surprisingly, many countries ban surrogacy outright.<sup>74</sup> For example, Italy, a predominately Catholic country with a more conservative social and religious view on surrogacy, banned surrogacy with the passage of the Medically Assisted Reproduction Law.<sup>75</sup> As a result of such bans, other developing countries like India have become a thriving market for fertility tourism. India, however, is not the only country to profit from this trend. Surrogacy agencies in Russia and Slovenia also seek to tap into the market of outsourcing commercial surrogacy by advertising on the Internet and highlighting the more favorable treatment towards surrogacy that their countries provide — *vis a vis* little or no regulation of commercial surrogacy.<sup>76</sup> In particular, Russian and Slovenian surrogacy agencies strive to capture a share of the demand for commercial surrogacy from infertile couples in countries with more restrictive laws like Great Britain and Italy.<sup>77</sup>

Fertility tourism is not limited to just gestational surrogacy arrangements. It is defined as "the network of services set up to provide infertility treatment to travelers from abroad."<sup>78</sup> While the American demand for fertility tourism in India is attributable primarily to the dramatic savings India offers,<sup>79</sup> the primary motivations for most European couples participating

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72. Ali & Kelley, *supra* note 10, at 49.

73. Storrow, *supra* note 57, at 301.

74. Peter R. Brinsden, *Clinical Aspects of IVF Surrogacy in Britain*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 99, 100 (Rachel Cook et al. eds., 2003).

75. Storrow, *supra* note 57, at 306.

76. *Id.* at 307.

77. *Id.*

78. *Id.* at 300.

79. Ali & Kelley, *supra* note 10, at 49.

in fertility tourism are the restrictive domestic laws and cultural stigmas associated with commercial surrogacy in their home countries.<sup>80</sup> For example, some couples are unable to obtain a particular type of infertility treatment where they live — due to lack of technology, lack of demand, unavailability of treatment due to legal restrictions, or deliberate court inaction in adjudicating disputes involving surrogacy arrangements.<sup>81</sup>

While many countries such as Italy and Sweden forbid surrogacy as a form of infertility treatment,<sup>82</sup> others permit fertility treatments but regulate them heavily, as do Canada and Great Britain.<sup>83</sup> Canada and Great Britain are rare examples of countries that have “comprehensive legislation controlling many aspects of assisted reproduction,” and also provide medical coverage for fertility treatments under their socialized medical plans.<sup>84</sup> However, regulation that is overly restrictive towards the practice of surrogacy has not eliminated the practice. Rather, it has boosted demand for fertility tourism.<sup>85</sup>

In some cases, the practice is not only banned but is also cause for criminal prosecution.<sup>86</sup> Such a case arose when Dominique and Sylvie, a French couple, sought to evade restrictive surrogacy laws in their home country.<sup>87</sup> The French couple flew to San Diego, California to hire a gestational surrogate who eventually gave birth to twin girls on October 25, 2000.<sup>88</sup> However, the couple encountered legal challenges with the French government when they tried to return home with their twin daughters.<sup>89</sup> The French government filed criminal charges against the couple alleging fraud and facilitating a deal between an adopting parent and one willing to abandon her child.<sup>90</sup> In addition, the French government voided any legal declaration that the twins were the children of the French couple.<sup>91</sup> The French Court of Appeals, also known as the *Cour de Cassation*, eventually ruled in favor of recognition of the French couple’s parental status and dismissed the criminal charges filed by prosecutors on the ground that the case had been improperly pled.<sup>92</sup> Had the prosecutor adequately pled the case and won, the twins would have been born without any legal parents in

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80. Storrow, *supra* note 57, at 303.

81. *Id.* at 301.

82. *Id.* at 303.

83. *Id.* at 304.

84. *Id.*

85. *Id.* at 306-07.

86. Gilles Cuniberti, *Flying to California to Bypass the French Ban on Surrogacy*, CONFLICT OF LAWS.NET, Nov. 5, 2007, <http://www.conflictoflaws.net/2007/jurisdiction/usa/flying-to-california-to-bypass-the-french-ban-on-surrogacy>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

the eyes of the courts, and the French couple would have been convicted criminals for going abroad to evade French law: "*fraude à la loi*."<sup>93</sup> Had the twin girls not been recognized as French citizens, the French courts could have ordered them returned to the U.S. without any recognizable legal parents. It could have been a custody-and-immigration media fiasco on the order of Elian Gonzalez, except here, France would be the one trying to prevent its citizens, the biological parents, from bringing their two daughters home to their native country for its own political reasons. Such a result would run counter to the public policy of protecting both the children and the family.

Great Britain is another example of a country with misguided legal and political positions regarding commercial surrogacy. Under the Human Fertilisation and Embryology Act ("HFE Act"), Great Britain restricts the practice of surrogacy with strict guidelines, which Richard Storrow argues do not arise from motivations of ethical and moral considerations.<sup>94</sup> Instead, Storrow argues Great Britain understood that regardless of its policy position, its citizens would continue to seek commercial surrogacy, thus there was no need to permit it in Britain due to "the availability of surrogates for hire in other parts of the world."<sup>95</sup> Great Britain prefers to "pass the buck" to other countries to deal with regulating commercial surrogacy, while allowing its own citizens to benefit from fertility tourism. Such an apathetic approach to addressing the need for regulating commercial surrogacy within its own borders burdens developing nations like India, requiring them to bear the brunt of sorting out the attending complex legal, social, and ethical issues related to commercial surrogacy. Laws have not kept pace with advancing growth in reproductive technologies. As a result, the vacuum for regulation in these areas has been filled by medical societies, such as the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology in the U.S.,<sup>96</sup> and the Indian Council of Medical Research in India.<sup>97</sup>

Great Britain relies upon a policy of defining parenthood by genetic ties to regulate the technological advancement of IVF.<sup>98</sup> As a result, the new practice of gestational surrogacy creates "deep unease at the dislocations between genetic, gestational, and post-natal parenthood," leading to the development of incomplete legislation to address the complications surrounding commercial surrogacy and essentially creating a "de facto disad-

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93. "Obtained for the sole purpose of avoiding the application of French law." Cuni-  
berti, *supra* note 87.

94. Storrow, *supra* note 57, at 305.

95. *Id.*

96. *Id.* at 304.

97. Chu, *supra* note 14, at A21.

98. Martin H. Johnson, *Surrogacy and the Human Fertilisation and Embryology Act*,  
in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 93 (Rachel Cook et al. eds.,  
2003).

vantaging of those who pursue this route to parenthood.”<sup>99</sup> A closer look at the HFE Act demonstrates that it was designed to address those issues arising from the advancement of reproductive technologies, especially the “genetic material” involved in IVF.<sup>100</sup> The HFE Act only deals with the “gamete or embryo ‘donation’ to the surrogate” through a “licensed clinic — medically assisted surrogacy.”<sup>101</sup> Section 30 of the HFE Act (“Section 30”) is designed to cover non-commercial surrogacy arrangements by providing that the “commissioning parents, who have a genetic interest in the child born of a surrogacy arrangement . . . be made the legal parents through a parental order,” thus eliminating the need to file adoption proceedings to gain custody of the child gestated by the surrogate.<sup>102</sup>

However, the statute is not as simple as it sounds. In order to successfully transfer legal parental status from the gestational surrogate to the commissioning parents, Section 30 requires that stringent criteria be met. First, the commissioning parents must be *heterosexual and married*, thus excluding homosexual couples of either gender, non-married heterosexual couples, and single persons.<sup>103</sup> Second, there must be a showing before the court that the surrogate received *no financial or other beneficial consideration* in exchange for her services as a surrogate, thus legally invalidating any commercial surrogacy arrangement before the court.<sup>104</sup> Third, the commissioning parents must “apply to the courts within six months of the birth of the child,” which includes meeting the residence and age requirements, “the child’s home must be with [the commissioning parents],” and “the surrogate must have handed the child to [the commissioning parents].”<sup>105</sup>

The only protection Section 30 provides the surrogate is the requirement that the commissioning parents must show the court that the surrogate provided informed consent no earlier than “six weeks after the birth of the child.”<sup>106</sup> This is true whether the surrogate is a traditional surrogate, who provided her own eggs as a donor, or a gestational surrogate, who has no genetic ties to the baby.<sup>107</sup> It is only during this period that the surrogate is granted priority legal status as the birth mother before the commissioning mother, with or without genetic ties to the baby, obtains legal custody.<sup>108</sup>

These limitations demonstrate how the HFE Act is bent towards discouraging commercial surrogacy by limiting the pool of eligible people

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99. Johnson, *supra* note 99, at 94.

100. *Id.* at 93.

101. *Id.*

102. *Id.* at 93-94.

103. *Id.* at 94.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

who meet the stringent criteria required by the British courts to enforce any rights. The HFE Act also excludes parties who are involved in surrogacy arrangements outside the prescribed conditions in Section 30.<sup>109</sup> In fact, the HFE Act is almost like a passive ban on surrogacy because it only applies in limited cases "where it is impossible or highly undesirable for medical reasons for the intended mother to carry a child herself."<sup>110</sup> Even in a best-case scenario, the HFE Act cannot adequately balance the interests of all parties involved. Commissioning parents are ultimately left without a legal remedy if the gestational surrogate changes her mind and decides to keep the money and the baby: Under the HFE Act, the surrogacy contract cannot be enforced.<sup>111</sup> In the end, like Great Britain, most European countries do not protect commissioning parents' rights in surrogacy contracts, and in effect, make commercial surrogacy a risky venture.

B. THE FRAGMENTED APPROACH TO REGULATING COMMERCIAL SURROGACY IN THE UNITED STATES CAN LEAD TO UNINTENDED CONSEQUENCES

More and more women in the U.S. are acting as gestational surrogates. Since surrogacy laws in the U.S. are governed by each state rather than nationally, there is no comprehensive data on the rate of growth in the industry. The data available is provided by private sources. In 2007, *Newsweek* reported that industry experts estimate that 1,000 surrogate births occurred in the U.S.<sup>112</sup> However, this data is not comprehensive, as it does not include data from every clinic or from private surrogacy agreements — including those involving same-sex couples.<sup>113</sup>

Many American women who participate as gestational surrogates defy the stereotype portrayed in *Baby Mama* — that of the uneducated working class woman. For example, many of these women are military wives.<sup>114</sup> These women started becoming gestational surrogates at the beginning of the Iraq War in 2003 and have been heavily targeted by fertility agencies for the financial savings they bring to the arrangement due to the availability of health insurance plans that cover fertility treatments.<sup>115</sup> Other individual examples of American gestational surrogates include a high school English teacher, who served as a surrogate for a German couple, and a married woman with three children of her own, who served as a surrogate for a

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109. Johnson, *supra* note 99, at 94.

110. Brinsden, *supra* note 75, at 100.

111. Gena Dodd, *Surrogacy and the Law in Britain: Users' Perspectives*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 113 (Rachel Cook et al. eds., 2003).

112. Ali & Kelley, *supra* note 10, at 47.

113. *Id.*

114. *Id.*

115. *Id.*

gay New Jersey couple.<sup>116</sup> The gestational surrogates' motivations are not limited to purely financial considerations. Indeed, some report enjoying the physical state of pregnancy, some feel it gives meaning to their lives, as if they were an organ donor, and others report the joy in helping others.<sup>117</sup> However, the majority of these women are motivated by financial need, and it is unclear if the number of women choosing to act as gestational surrogates will continue to grow during the current recession and economic crisis that began in the U.S. in 2007 with the advent of sub-prime foreclosures. Currently, twelve states in the U.S. ban surrogacy while an equal number of states legalize surrogacy.<sup>118</sup> This is particularly true of California where commercial surrogacy is explicitly legal and regulated.<sup>119</sup>

Radhika Rao, in *Surrogacy Law in the United States: The Outcome of Ambivalence*, makes some sense of the fragmented approach taken by the U.S. to regulate commercial surrogacy.<sup>120</sup> Rao categorizes U.S. regulation of surrogacy into four types: prohibition, inaction, status regulation, and contractual ordering.<sup>121</sup> States that disfavor surrogacy contracts include Indiana, Kentucky, Louisiana, Michigan, Nebraska, New York, and Washington.<sup>122</sup> Rao explains that states utilizing the *prohibition* approach try to ban surrogacy by imposing civil and criminal penalties on persons involved in surrogacy contracts.<sup>123</sup> For example, Michigan utilizes the prohibition approach by severely penalizing violators with misdemeanor charges that are "punishable by fines and/or prison."<sup>124</sup> A majority of states, like Indiana, Kentucky, and Nebraska, use the *inaction* approach, nullifying surrogacy contracts as against public policy.<sup>125</sup>

In contrast, other states use a more proactive approach by applying their own *status regulation* to surrogacy contracts through statutes that define "mandatory terms and create preordained status [family] relationships."<sup>126</sup> These states, including Arkansas and Texas, enforce valid surrogacy contracts as defined by their state statutes regulating surrogacy contracts.<sup>127</sup> Nevada and, to a lesser degree, California enforce surrogacy contracts based on *contractual ordering*.<sup>128</sup> In the absence of any contrary

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116. Ali & Kelley, *supra* note 10, at 47-48.

117. *Id.*

118. *Id.* at 47.

119. *Id.*

120. Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 23 (Rachel Cook et al. eds., 2003).

121. *Id.*

122. Drabiak et al., *supra* note 15, at 301-03.

123. Rao, *supra* note 121, at 24.

124. Drabiak et al., *supra* note 15, at 301.

125. Rao, *supra* note 121, at 26-27; Drabiak et al., *supra* note 15, at 302-03.

126. Rao, *supra* note 121, at 28.

127. Drabiak et al., *supra* note 15, at 302.

128. Rao, *supra* note 121, at 30-31.



law against surrogacy contracts, states like Nevada and California rely on contract law, as opposed to family law, to adjudicate such disputes.<sup>129</sup>

The confusing state of the law in the U.S. combined with expensive legal costs to deal with surrogacy contracts are also likely contributors to the heightened demand for fertility tourism in India. Rather than overemphasize the cost savings from hiring Indian surrogates, it is important to examine the bargaining power of American couples in India versus the U.S. It is equally important to examine the policies applied by U.S. courts in surrogacy disputes, which are generally more restrictive than those in India.

To understand how the disparate policy and legal positions on surrogacy laws in the U.S. work, it is important to look at a real example of how the laws can be circumvented by agencies that treat surrogacy as a purely profit-driven business transaction. Circumvention is possible due to the lack of federal standards and national consensus on the social, ethical, and political implications of the legality of commercial surrogacy. This is an especially contentious subject in light of the long-running disputes over stem cell research, gay marriage, and abortion in the U.S. The next few pages will illustrate how surrogacy agencies successfully exploit and profit from commercial surrogacy with little oversight due to the lack of federal guidelines and the states' inability to address the loopholes created by interstate contractual agreements.

In *Ethics, Law and Commercial Surrogacy*, Katherine Drabiak explores the potential for exploitation created by the states' weak ability to police commercial surrogacy, particularly surrogacy agencies that intentionally exploit conflicting state laws to their advantage, or that evade restrictive laws of states set on restraining the practice of commercial surrogacy.<sup>130</sup> Drabiak demonstrates how these agencies ignore the need to balance financial interests in surrogacy arrangements with ethical concerns arising from the emotional burdens of the parties involved in the transaction.<sup>131</sup> The infertile couple carries the emotional burden of having tried and failed to start a family naturally. There is also, however, the emotional burden carried by the surrogate mother, who voluntarily agrees to deliver a baby and relinquish custody of the child to the commissioning parents, despite emotional bonds and potential health risks that may occur during the pregnancy. The federal government should comprehensively address these factors, as well as the safety and ethical concerns for the child. In addition, the federal government should ensure that the arrangements are free of coercion and that each party bargains on equal footing.

To illustrate the deficiencies in U.S. surrogacy regulation, the following is a real case, in which an Indiana-based surrogacy agency ("the agent")

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129. Rao, *supra* note 121, at 30-31.

130. Drabiak et al., *supra* note 15, at 300-01.

131. *See id.*

capitalized on the state's conflicting laws. Indiana allows surrogacy contracts without penalty, including granting transference of parental rights through adoption in surrogacy cases, despite the fact that Indiana also considers surrogacy contracts void.<sup>132</sup> Through the Internet, the agent was able to obtain an out-of-state client from a state with lenient surrogacy laws.<sup>133</sup> The agent matched the client, a single man from New Jersey ("the commissioning father"), with a black South Carolinian woman ("the gestational surrogate") willing to serve as a surrogate.<sup>134</sup> The agent took no precautionary measures to screen either party, providing neither counseling nor screening for mental, physical, or emotional health.<sup>135</sup> Both parties traveled to Indiana to execute the surrogacy contract and to establish jurisdiction there.<sup>136</sup>

Complications arose after the birth of twin girls when an investigation revealed that the commissioning father, who asserted his right to transfer parental rights through a surrogacy contract, was found to be a questionable character, thus bringing to light Indiana's conflicting surrogacy and adoption laws.<sup>137</sup> The first problem was legal: Indiana allows surrogacy contracts, but it also nullifies enforcement of the contract.<sup>138</sup> Further, even though the surrogacy contract was void, Indiana nonetheless allows the parties in a surrogacy agreement to transfer parental rights through adoption.<sup>139</sup> However, to adopt a child in Indiana, if the adopting parent is not genetically tied to the child, the adoptive parent must be a resident of Indiana.<sup>140</sup> When the paternity of the twin girls was still in question, the commissioning father listed as his place of residence the hotel address where he was temporarily residing in order to meet the residency requirement.<sup>141</sup> Although the genetic tests revealed that the commissioning father was indeed the biological father, further investigation raised concerns about the fitness of the commissioning father to take custody of two prematurely born infants.<sup>142</sup>

Two additional incidents raised red flags. First, the commissioning father attempted to visit the premature twins in the neonatal intensive care unit while carrying a live bird inside his shirt pocket and wearing a shirt stained with bird feces.<sup>143</sup> Next, the commissioning father attempted to take the infants out of the hospital to drive them home to New Jersey while

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132. Drabiak et al., *supra* note 15, at 301.

133. *Id.*

134. *Id.* at 300.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 302.

139. *Id.* at 300.

140. *Id.*

141. *Id.* at 300-01.

142. *Id.*

143. *Id.* at 300.

they were still breathing through ventilators.<sup>144</sup> Out of concern for the twins, the hospital staff brought the case to the attention of the child welfare agency.<sup>145</sup> Further investigation divulged that the surrogacy agent haphazardly completed records.<sup>146</sup> The agent lied about the commissioning father's residency, describing the fitness of his Indiana hotel room as "adequately furnished" and referring to the housekeeping standards as "acceptable" for bringing the infants home from the hospital.<sup>147</sup> The agent further declared the gestational surrogate to be the biological mother, which proved untrue when white twin girls were born from a black woman.<sup>148</sup>

Here, the agent's primary motivation was facilitating a profitable commission from the surrogacy arrangement. The agent ignored its ethical duty to screen the single male seeking to become a father with concern for the safety or well-being of the children to be produced from the surrogacy arrangement. The fact that the gestational surrogate was not the biological mother of the twin girls further complicated the case since Indiana adoption laws require the biological mother to relinquish her legal rights to the children.<sup>149</sup> Moreover, in Indiana, the law treats egg donors as automatically relinquishing parental rights.<sup>150</sup> This case illustrates that the unintended consequence of inaction from the federal government in regulating commercial surrogacy is an increase in reckless acts by surrogacy agencies and fertility specialists who will slip through the regulatory cracks. Creating twin girls from an unfit biological father and an egg donor, resulting in no identifiable biological mother,<sup>151</sup> is not the kind of by-product of commercial surrogacy that we should foster.

Indiana reveals how its laws are ill-equipped to deal with surrogacy agents and private parties seeking to "circumvent interstate adoption laws" by exploiting the states' conflicting laws for profit through interstate gestational surrogacy contracts.<sup>152</sup> In the absence of federal regulation, Drabiak points out that surrogacy agencies are free to exploit conflicting state laws by luring a multistate consumer base and potential gestational surrogates into manipulative interstate contracts, preventing individual states from regulating the industry.<sup>153</sup> Drabiak highlights this case as an argument in favor of federal regulation of commercial surrogacy through Congress' power to regulate interstate commerce.<sup>154</sup> There are very few legal reme-

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144. Drabiak et al., *supra* note 15, at 300.

145. *Id.* at 301.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 300-01.

150. *Id.*

151. *Id.*

152. *Id.* at 301.

153. *Id.*

154. *Id.* at 306.

dies for private parties who fall victim to these exploitative commercial surrogacy contracts, since many states either ban commercial surrogacy or provide commissioning parents with no legal remedy in the event of a breach of a surrogacy contract.<sup>155</sup> Similarly, in a transnational surrogacy arrangement, if India's courts continue to refuse to adjudicate surrogacy cases and the Indian government fails to enact laws to regulate commercial surrogacy, American couples who rely on Indian women as gestational surrogates could be left without legal remedies in the event of surrogacy contract disputes abroad. Keep this in mind as we turn to Israel, which provides a clear contrast and a successful model in regulating commercial surrogacy.

#### IV. ISRAEL: A SUCCESSFUL MODEL FOR REGULATING SURROGACY

##### A. ISRAEL'S CULTURAL AND RELIGIOUS HISTORY PROVIDES A PERSPECTIVE ON ITS REGULATORY APPROACH TO COMMERCIAL SURROGACY

Israel provides a unique model for addressing the legal implications of commercial surrogacy. Israel's legal system requires a careful balance between deeply rooted cultural practice, religious tradition, and civic life, while respecting individual autonomy.<sup>156</sup> Furthermore, Israel is a multi-racial country with a majority immigrant population from Eastern Europe, the Mediterranean, the Middle East, and the Far East.<sup>157</sup> Unlike India's inaction, the United State's reliance on state regulation, and the E.U. states' restrictive laws, Israel takes a bold and pragmatic approach to creating effective regulation of commercial surrogacy. As early as 1992, Israel recognized that it could not ignore the need for regulation once the advancement of reproductive technologies created the use of IVF.<sup>158</sup> In *Surrogacy in Israel: An Analysis of the Law in Practice*, Rhona Schuz documented how Israel led the way in creating a uniform, comprehensive, and balanced regulatory scheme to deal with the legal implications of surrogacy.<sup>159</sup> Israel unequivocally formed a policy position to legalize and regulate surrogacy in order to protect birth mothers, commissioning parents, children, and the general public from the effects of surrogacy.<sup>160</sup> Before exploring the legal tools Israel utilizes, it is important to provide some context to un-

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155. Drabiak et al., *supra* note 15, at 303.

156. Joseph Schenker, *Legitimising Surrogacy in Israel: Religious Perspectives*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 243, 244-45 (Rachel Cook et al. eds., 2003).

157. *Id.* at 243-44.

158. Rhona Schuz, *Surrogacy in Israel: An Analysis of the Law in Practice*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 35, 36 (Rachel Cook et al. eds., 2003).

159. *Id.*

160. *Id.* at 35.

derstand Israel's unique cultural tradition and its effect on civil law, which allow for fewer political constraints in creating a comprehensive policy on surrogacy.

One of the roots of Jewish tradition can be found in the Old Testament, where Genesis 16 provides a perspective: "Behold now, the Lord has prevented me from bearing children; Go to my maid, Hagar, it may be we shall obtain children from her. And Hagar bore Abram a son, Ishmael."<sup>161</sup> This is the story of Abram's wife, Sarai, who at age eighty suggested to her husband that they use her maid, Hagar, as a surrogate to bear them a child because Sarai was unable to conceive.<sup>162</sup> Another childless biblical figure, Rachel, also used her maid, Bilha, to bear a child with her husband Jacob.<sup>163</sup> It is important to note the pragmatic approach that Jewish tradition applies to its understanding of marriage — the importance of building a family — and also to compare the parallels of Israel's similarly pragmatic approach to addressing its need for regulating commercial surrogacy.

In *Legitimising Surrogacy in Israel: Religious Perspectives*, Joseph Schenker explains that Judaism does not limit the purpose of marriage exclusively to procreation.<sup>164</sup> Instead, the Jewish tradition views marriage as both a legal and a religious commitment between a man and a woman, where each owes duties to the other.<sup>165</sup> Schenker explains that in the Jewish tradition, "[t]he duty to marry and procreate is independent of social status or religious position."<sup>166</sup> Under the traditional Christian view of marriage, sexual intercourse between married couples is sanctioned exclusively for the purpose of procreation, and the use of contraception is highly restricted.<sup>167</sup> In contrast, Jewish law "recognises sexual desire" within the marriage and believes that "[e]ach married partner has conjugal duties toward the other."<sup>168</sup> Guilt and repression, from the sin of deriving physical pleasure from sex, are not rooted in Judaism.<sup>169</sup> Rather, the Jewish tradition takes a natural understanding of human needs. Perhaps this is why Israel takes a similarly broad political approach to reproductive technologies; it is not burdened by the belief that children are only legitimately conceived naturally, between a husband and a wife. The first Jewish law is the command God gave to Adam: "Be fruitful and multiply."<sup>170</sup> Yet, Judaism does not take this command literally to mean that the only purpose of marriage is to have children.

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161. Schenker, *supra* note 157, at 243; *see also* Genesis 16:2, 16:15 (Revised Standard Version, Catholic Edition).

162. Brinsden, *supra* note 75, at 99.

163. Schenker, *supra* note 157, at 243; *see also* Genesis 30:1 (Revised Standard Version, Catholic Edition).

164. Schenker, *supra* note 157, at 252.

165. *Id.*

166. *Id.*

167. *Id.* at 252-53.

168. *Id.*

169. *Id.* at 252.

170. *Id.* at 253; *see also* Genesis 1:28 (Revised Standard Version, Catholic Edition).

However, this is not to discount the importance of having children in the Jewish faith. In fact, when Rachel was unable to bear Jacob a child, she responded, "Give me children or else I die."<sup>171</sup> Israel is identified as a "pro-natalist society," meaning its people are willing to try any means to have children.<sup>172</sup> It is because of Israel's pro-natalist bent that the country invested large amounts of resources into developing reproductive technologies, resulting in the "highest number of fertility clinics per capita in the world."<sup>173</sup> In fact, Israel's national health insurance funds IVF treatments both to married women and single women for up to two successful births.<sup>174</sup> Schenker explains that under Jewish law, "an infertile couple should undergo diagnosis and treatment."<sup>175</sup> The second and third Jewish laws also place fertility treatments in harmony with, rather than in conflict with Jewish tradition: the second, "the mitzvah of loving kindness;" and the third, "family integrity."<sup>176</sup> Schenker argues that because of these three laws, Jewish tradition understands the practice of helping childless married couples by all means possible, so long as no one else gets hurt, in the interest of preserving "domestic peace and the integrity of the family."<sup>177</sup>

Israel incorporates a hybrid legal system which relies on both civil and religious law.<sup>178</sup> Schenker further states, "there is the law of the State of Israel which establishes the halakhah as state law in all matters affecting personal status, which includes marriage, divorce, and legitimacy, and affords the rabbinical courts the status of civil courts of law within that wide sphere."<sup>179</sup> Civil and Jewish law overlap when the parties involved are adherents to the Jewish faith, Schenker explains:

Jewish law continues to be applied by the rabbinical courts within their jurisdiction in matters of personal status. . . . It gave the rabbinical courts exclusive jurisdiction in matters of marriage and divorce where they are naturally dealt with in accordance with Jewish law. In matters of personal status concerning Jewish parties the general courts are also required to decide according to Jewish law, except when law of the state makes express provision on the matter. The law of adoption in 1960 was excluded from the definition of matters of personal status. It is in this context that the law governing surrogate motherhood took shape.<sup>180</sup>

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171. Schenker, *supra* note 158, at 253; *see also* Genesis 30:1 (Revised Standard Version, Catholic Edition).

172. Elly Teman, "Knowing" the Surrogate Body in Israel, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 261, 262 (Rachel Cook et al. eds., 2003).

173. *Id.*

174. *Id.*

175. Schenker, *supra* note 157, at 253.

176. *Id.* at 259.

177. *Id.*

178. *Id.* at 244-45.

179. *Id.*

180. *Id.* at 245.

In the modern era, Schuz lauds Israel's regulatory scheme for being at the forefront of the international community and finds it to be the best existing example of a "full fledged regulatory regime for approving surrogate motherhood agreements."<sup>181</sup>

B. ISRAEL'S COMMITMENT TO ENFORCEMENT: A MODEL FOR PROTECTING THE PUBLIC WITHOUT COMPROMISING INDIVIDUAL AUTONOMY AND ETHICAL STANDARDS

As early as 1992, Israel formed the Aloni Commission ("the Commission") to evaluate the potentially complex issues that advancements in reproductive technologies (like IVF) could bring.<sup>182</sup> The Commission articulated a policy position to maintain a balance between the State's interest in regulating human reproduction while respecting personal autonomy and privacy.<sup>183</sup> Although the Commission did not intentionally legalize commercial surrogacy, the Surrogate Motherhood Agreements Law ("the Law") banned relatives of commissioning parents from serving as gestational surrogates, which allowed other women to serve as gestational surrogates who can be compensated for their time and suffering.<sup>184</sup> This had the unintended effect of creating a regulated, legal commercial surrogacy program in Israel.<sup>185</sup> One notable exception under the Law is its ban on "partial surrogacy," as the *In re Baby M* case, where the surrogate would have been the biological mother by donating her own eggs.<sup>186</sup> Thus, in Israel traditional surrogates are no longer hired because the law only permits gestational surrogacy.<sup>187</sup> This is in direct contrast to the U.S. and India, where birth mothers retain genetic ties the infant(s) she bears, because there are no outright bans on traditional surrogacy.

The most striking aspect of Israel's laws dealing with commercial surrogacy is how well the system is organized. The implementation of the Law rests with the "Approvals Committee," which is responsible for judicial review and formal approval of surrogacy contracts, ensuring all parties' interests are protected in a balanced way, and protecting the integrity of Israel's public policy regarding commercial surrogacy.<sup>188</sup> In order to protect gestational surrogates from exploitation, Israel requires comprehensive screening of potential candidates to ensure: suitability of the parties, voluntary and informed consent, physical and mental health precautions, as well as financial safeguards.<sup>189</sup> The Law requires an initial medical and psycho-

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181. Schuz, *supra* note 159, at 36.

182. *Id.*

183. *Id.*

184. *Id.* at 36.

185. *Id.*

186. *Id.*; *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

187. Schuz, *supra* note 159, at 36.

188. *Id.* at 36-48.

189. *Id.* at 38.

logical suitability assessment of potential candidates by an independent professional.<sup>190</sup> The candidate for gestational surrogacy is presumed unable to objectively assess her own suitability.<sup>191</sup> The screening process is covered by Israel's public healthcare system and couples are able to obtain IVF treatments for approximately \$500 through the IVF Centre at Rambam Hospital, a dramatic savings compared with the cost of \$8,000 for private procedures.<sup>192</sup> The Centre at Rambam Hospital performs candidate screenings and provides social workers to accompany the parties throughout the process.<sup>193</sup> In the final stages, the Approvals Committee performs a review, ensuring that all of the necessary aspects of the surrogacy agreement are considered in the contract.<sup>194</sup> The Approvals Committee reviews issues implicated in the surrogacy contract, including fairness to both parties, full disclosure, adequate legal counsel for the surrogate, restrictions and requirements regarding the medical facility and type of treatment agreed to, the surrogate's right to refuse medical procedures during the process, a provision for psychological counseling for the surrogate for the six months after she gives birth, and a provision ensuring the protection of the surrogate's privacy (for example, preventing intrusive requests by the commissioning parents to be present at all medical examinations and precluding public disclosure regarding the details of the parties' agreement).<sup>195</sup>

Unlike India and the U.S. — where the responsibility to protect gestational surrogates is left to the voluntary self-regulation of the community (like the American Society for Reproductive Medicine and the Indian Council of Medical Research) or to private practitioners (like Dr. Patel) — Israel's public healthcare system receives guidance from the Approvals Committee and provides adequate protections and resources to participating gestational surrogates. Perhaps the amount of resources the Law requires for gestational surrogates — legal counsel, social workers, medical professionals, and psychologists to assist with postpartum counseling — may explain why there is no market for private surrogacy agencies in Israel.<sup>196</sup> As a result of this comprehensive regulation, Israel has substantially reduced the risk of exploitation and coercion of women who serve as gestational surrogates. Israel has created a regulatory system of clarity, certainty, and effectiveness.

The Law does not provide specific guidelines on reasonable compensation figures for surrogates, and the Approvals Committee does not interfere with the negotiations.<sup>197</sup> However, the extensive review process by the

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190. Schuz, *supra* note 159, at 38.

191. *Id.*

192. *Id.* at 37 n.12.

193. *Id.* at 37.

194. *Id.* at 39.

195. *Id.* at 41-42.

196. *Id.* at 37.

197. *Id.* at 42.



Approvals Committee for fairness and the binding effect of the contract make it difficult to financially exploit gestational surrogates.<sup>198</sup> Israel's proactive approach to enacting laws and forming a regulatory agency provides adequate protections to ensure that the surrogate is not the most vulnerable party to the transaction. In contrast, an Indian surrogate's opportunity to receive adequate screening and counseling is at the behest of the individual fertility clinic. Considering the Indian courts' refusal to adjudicate cases dealing with commercial surrogacy, the lack of legal precedent, and the absence of laws addressing the issue, Indian surrogates are especially vulnerable to exploitation. The circumstances are not entirely different in the U.S. With no federal laws addressing the need to regulate the industry and the states' inability to bridge the gap, American women are also at risk for exploitation. Neither India nor the U.S. ensures that surrogates receive proper screening, both psychological and medical, or provides surrogates with counseling, legal or psychological, that is guaranteed under Israel's system.

The scope of the Approvals Committee's protections do not stop with the gestational surrogate — they also ensure against exploitation of the commissioning parents.<sup>199</sup> Although commissioning parents are generally perceived to be in a better bargaining position, the Approvals Committee seeks to protect their emotional vulnerability as well.<sup>200</sup> Since the Approvals Committee requires such a grueling screening process of the parties before granting legal effect to the surrogacy contract, the Law denies the gestational surrogate the right to breach the contract, with some exceptions for changed circumstances.<sup>201</sup> Thus, Israel can be a model for the international community, correcting for elements of Israel's uniqueness in culture, geography, population size, and other aspects that are not duplicable. At a minimum, the Israeli system stands for the argument that providing regulation can help countries avoid ethical and social concerns arising from commercial surrogacy while not unnecessarily stripping the privacy and autonomy of parties to a surrogacy contract. It is the absence of regulation — a result of the legal system not keeping pace with advancements in reproductive technologies — that exposes the practice of surrogacy to the worst possible standards and exposes individual surrogates, intending parents, and the children conceived to the highest risks.

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198. Schuz, *supra* note 159, at 42.

199. *Id.* at 43.

200. *Id.*

201. *Id.*

## V. CONCLUSION

As the social stigma attached to surrogacy is dissipating, the call for regulating commercial surrogacy is alive and well today. India provides a prime example of a developing country coping with the challenges of advancing areas of law dealing with the by-products of advanced reproductive technology, particularly outsourcing commercial surrogacy to global clients. As a direct contrast to India, Israel proves that commercial surrogacy can successfully be regulated domestically. The Israeli regulatory scheme presents an effective model for countries seeking to regulate commercial surrogacy. Since the use of IVF will likely continue and advance further fertility treatments, the practice of hiring gestational surrogates will likely continue and expand. In an integrated global society, inaction can have direct consequences to all. It is imperative that the governments of E.U. countries and the U.S. understand that refraining from regulating commercial surrogacy due to the moral debate surrounding the issue will serve only to exacerbate the problems of this growing industry. Avoiding regulation would burden developing states, like India, with fewer resources and legal tools to tackle this issue.

E.U. countries and the U.S. must take the lead in regulating the practice globally. Governments should recognize their duty to protect children, women, and families from opportunistic and reckless practitioners who primarily seek to profit from the existing climate of disparate regulation of commercial surrogacy. Many public policy issues can no longer be resolved within the isolation of national borders. Whether it is climate change, the current economic crisis, terrorism, or commercial surrogacy, success requires either global coordination or cooperation. Inaction could harm the health and safety of women and children. Courts will also need guidance from the legislative branches of government in articulating legal standards to adequately adjudicate surrogacy-related disputes, and to criminally prosecute those who either intentionally or recklessly hurt any of those involved — particularly the children produced from surrogacy arrangements.

We have already seen what deregulation can do to the global economy. It is only a matter of time before more children are conceived through surrogacy to unfit commissioning parents, requiring the intervention of social services agencies at hospitals — as in the situation of the Indiana twins born to an unfit father. In fact, continued U.S. inaction proved in 2009 that the Indiana twins' story was not an isolated case. The public attention and outrage over Nadya Suleman, a potentially mentally unstable, unemployed, single mother, giving birth to octuplets reminds us that the need for regulation is not limited to the narrow issue of commercial surrogacy, but rather encompasses all procedures involving the use of advanced reproductive technologies, whether involving commercial surrogacy, fertility clinics, IVF treatments, or medical practitioners.

We should begin with addressing the issue domestically, like Israel. Additionally, we should recognize Israel as a successful model for pragmatic approach to regulation of commercial surrogacy. Israel's comprehensive system of regulation provides the resources and oversight necessary to prevent harm from careless surrogacy agencies and fertility clinics. Moreover, we should not allow further tragedies and public outrage before addressing this issue. Now is the time to act.